United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

75-7676

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

-against-

EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

-and-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs-Appellants
400 Madison Avenue
New York, New York 10017

Of counsel:
STANLEY GELLER

(5259B)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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BRIEF OF PLAINTIFFS-APPELLANTS

Preliminary Statement

This is an appeal from an order of the District Court in the Southern District of New York (Brieant, J.) denying appellants' motion for a rehearing of appellee Edith Sideman's

motion for summary judgment (A2), and also from a judgment of the same court summarily dismissing appellants' complaint against appellee and other defendants who, in the opinion of the court below, are in the same position as appellee (A51-A52). The decision of the District Court has not yet been reported.

Statement of the Issues

The sole issue in this case is whether there is not a question of fact in this action as to whether, when appellee Edith Sideman and the other defendant residents persuaded the defendant public officials to institute and prosecute proceedings against the individual appellant which the District Judge assumed were in violation of law, and when appellee Sideman actively participated in one of those proceedings, she had knowledge that they were in violation of law.

Statement of the Case

The action in which this appeal arises is brought under the First, Fifth and Fourteenth Amendments of the United States Constitution and under the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1985. At the present stage, it is one for damages*

*The issue of injunctive relief is moot, since appellants are no longer in business (A24).

resulting from the activities of certain public officials and residents of the Village of Mamaroneck, New York (hereinafter the "Village"), who appellants allege have forced them out of the profitable business of operating a discotheque in the Village, primarily because the defendants were hostile to the patrons of the discotheque, a majority of whom were black and hispanic and in any event were of a different ethnic, social, cultural and economic class from the residents of the area. Appellants claim that the defendants, individually and as part of a conspiracy, and acting with malice, forced appellants out of business, among other means, by invoking against them two local ordinances which were and are unconstitutional and which the defendants knew or had good reason to know were invalid, and by prosecuting the individual appellant and other employees of the corporate appellant selectively under one of the ordinances.

One of the defendants, appellee Sideman, who is a resident (as opposed to being a public official) of the Village, moved for summary judgment on the basis of the complaint, without interposing an answer, and in support of her motion she submitted only an affidavit (ultimately, two affidavits) of her attorney (A16-A18, A49-A50). Thus, she never personally,

no less under oath, denied appellants' allegation in the complaint, which defendants amplified in affidavits, that she, individually and in concert with the other defendants, and acting with malice, forced appellants out of business for the improper reasons and by the illegal means described above.

Nevertheless, the District Judge not only granted appellee's motion for summary judgment, but he also, on his own motion, dismissed appellants' case summarily against the other appellees who are residents ("John Doe," "Richard Roe" and "Thomas Hoe").

Statement of the Facts

In setting forth the facts, on this appeal from a summary judgment, appellants will state them as they are alleged or may reasonably be inferred from the allegations in appellants' papers.

At the beginning of 1974, through the corporate appellant, the individual appellant, who is the president and one of the two stockholders of the corporate appellant, operated a restaurant in the Village (A3-A4, A19). At that time, for reasons not pertinent to this appeal, appellants decided to close

the restaurant and open a discotheque, which they did (A4, A19-A20). Their plans for doing so were duly submitted to and approved by the appropriate officials of the Village, and so were the alterations made in accordance therewith (A5, A20).

The discotheque opened in April, 1974, and was an immediate success, earning a net profit of $3,500 per week in the first two months of operation (A5, A20). On the other hand, it attracted as patrons a group or class of people who were mainly young, black and hispanic, and were thus quite different from the inhabitants of the residential area in the rear of the commercial area in which the discotheque was, quite legally and properly, located (A5, A20, A38). One of those residents is appellee Sideman (hereinafter "Sideman"; A4, A20, A40).

Sideman joined with some of her fellow residents to persuade certain public officials of the Village to put appellants' discotheque out of business and then to work with the public officials to achieve that end (A5, A12, A20-A21). Beginning in June, 1974, Sideman and her fellow conspirators attempted to close down appellants' discotheque by preventing its patrons from parking in the area, a traditional method employed in some areas to keep out "undesirables" (A21, A38). They, therefore, at first

focused their complaints against the discotheque on the parking habits of its patrons (A21, A39). They subsequently revealed, however, that their claim of an alleged "parking problem" was spurious, when appellants, who took their claim at face value, sought to solve that "parking problem" (A21, A41).

Appellants made an arrangement with the landlord of the nearby A & P supermarket by which the discotheque's patrons would have been able to use the supermarket's parking space at night and in the early hours of the morning, since it was not then needed by the supermarket's patrons (A21, A41). That arrangement, of course, would have kept the discotheque's patrons from parking in the streets of the area, and thus would have solved any "parking problem" created by their presence in the area. Sideman and her fellow conspirators, however, persuaded the landlord of the A & P supermarket to cancel his arrangement with appellants, and, as if to emphasize the hypocrisy of their conduct they asserted as their reason that the use of the supermarket's parking space by the discotheque's patrons would have presented a physical danger to the schoolchildren of the area when the latter walked to and from school, at which time, of course, the discotheque was not even in opera-

tion (A21, A41-A42)! Sideman was among those who signed a petition to this effect, which was presented both to the landlord and to the Village Board (A21, A40).

In July, 1974, the efforts of Sideman and her fellow conspirators to close down appellants' discotheque met with temporary success. Although appellants' plans for their discotheque had been approved by the Village Building Department, appellants had subsequently been directed by the State Department of Labor to install some additional improvements, mainly additional fire exits (A6, A21-A22). The State authorities, however, had not required appellants to close down their discotheque while making the improvements (A6, A22). Sideman and her fellow conspirators caused the appropriate Village authorities to step into this picture, to order appellants to close down the discotheque while installing the improvements, and to do so during the discotheque's busiest period, the Fourth of July weekend, (A6, A22). Then, when appellants refused to close down on that particular weekend, the individual appellant was maliciously charged with creating a criminal nuisance by remaining open (A6, A22). He was subsequently acquitted of that charge after a trial before a jury (A6-A22).

Immediately after the Fourth of July weekend, 1974,

appellants did close down their discotheque voluntarily in order to install the additional fire exits, and they expeditiously completed the installation (A6-A7, A22). As soon as they reopened the discotheque, however, in mid-July, 1974, Sideman and her fellow conspirators were ready with the means to close down the discotheque permanently. They now caused the individual appellant to be served with the first of multiple summonses charging him with the violation of a Village ordinance prohibiting "cabarets" from playing music or permitting dancing on their premises after 1 a.m. on weekdays and 2 a.m. on Sundays and holidays (A7, A23).

Sideman and her fellow conspirators were well aware that the "cabaret"ordinance was of more than doubtful constitutionality and that it was being invoked against the individual appellant in an invidiously discriminating way (A7-A9, A12, A23, A26, A42-A43). They knew that this ordinance had been enacted in the Prohibition Era, had served no legitimate purpose then or since, and had rarely, if ever, been invoked against anybody (A9, A23, A42-A43). They knew, specifically, that the other cabarets in the Village were then operating, and had for many years operated, in violation of the "cabaret" ordinance, and had

been doing so openly and with impunity (A8-A9, A23).

Shortly thereafter Sideman, and her fellow conspirators caused the individual appellant to be served with the first of multiple summonses under another Village ordinance, which prohibited any "noise" on any premises that was not "necessary" or was audible at a distance of more than 100 feet from the premises (A7, A23-A24). Even more than in the case of the "cabaret" ordinance, Sideman and her fellow conspirators were aware that this second ordinance was of doubtful constitutionality, since on the last prior occasion that a case under the ordinance had come before the Village Court, it had been noted by that Court that the "unnecessary noise" ordinance was probably unconstitutional, and in 1972 a substantially identical statute had been expressly held to be unconstitutional in the State Supreme Court in Nassau County (A9-A10, A12, A24-A26, A43-A44).

Sideman was a central figure in the prosecution of the individual appellant under the "unnecessary noise" ordinance (A24-A25, A43). Whenever Sideman determined that there was "unnecessary noise" emanating from appellants' discotheque, she would call the Village Police Department, and a police officer would visit the discotheque and present the individual appellant

with a summons (A24-A25, A43). It bears repeating at this point that this particular factual detail, as well as all of the others in this statement of facts, was not denied by Sideman or even by her attorney in the papers submitted in her behalf in the court below (A16-A18, A49-A50).

The individual appellant was tried on the charges specified in the initial summonses issued under both the "cabaret" ordinance and the "unnecessary noise" ordinance at the same time, on this occasion before the court alone, without a jury (A10, A23, A25). The trial took place under circumstances highly prejudicial to him, particularly since he had previously already filed claims against the Village and all of the individual public officials named as defendants in this case in an amount in excess of $2 million (A10). Nevertheless, Sideman and her fellow conspirators caused the individual appellant's application for a change of venue to be opposed by the Village authorities (A10-A11) including the Village Justice himself, who submitted an affidavit in opposition to the application in County Court. (Although this last detail does not appear in the record on this appeal, it is matter of public record in the County Court, of which, it is respectfully submitted, this Court can take judicial notice.)

The individual appellant was convicted of the charges in the initial summonses, and fined $1,200 (A10-A11, A23, A25). With other summonses still outstanding against him, and the prospect of more to follow, appellants were obliged to conform to the requirements of the "cabaret" ordinance, and, to the extent that they could do so, the vague and subjective standards of the "unnecessary noise" ordinance (A11, A24-A25). Doing so, however, necessarily caused their discotheque to lose patrons, since a discotheque does not even begin to attract patrons until almost midnight, and appellants were required under the "cabaret" ordinance to stop all music and dancing on their premises by 1 a.m. on weekdays and 2 a.m. on Sundays and holidays (A11, A24). When appellants' discotheque, which had netted $3,500 per week, began to suffer actual losses, they ended the business and sold their lease to a third party (A24).

Argument

THERE IS A TRIABLE ISSUE OF FACT IN THIS CASE AS TO WHETHER, WHEN SIDEMAN AND THE OTHER DEFENDANT RESIDENTS PARTICIPATED IN JOINT ACTIVITY WITH THE DEFENDANT PUBLIC OFFICIALS IN THE PROCEEDINGS BROUGHT AGAINST APPELLANTS, SIDEMAN AND THE OTHER DEFENDANT RESIDENTS HAD KNOWLEDGE THAT THOSE PROCEEDINGS WERE IN VIOLATION OF FEDERAL AND STATE LAW.

Appellants' argument on this appeal must begin with what is not in dispute. Appellee Sideman did not argue below, and the District Judge did not determine, that no violation of law had been committed against appellants, at least by the defendant public officials. The sole ground on which Sideman sought summary judgment, and the District Judge granted it, was that any such violation could not have been committed by a mere citizen (as opposed to a public official) even if the citizen acted jointly with the public official.

Thus, Sideman's counsel in an initial affidavit that is certainly noteworthy for its brevity stated his client's position as follows:

> " ... it is difficult to see how the defendant, Edith Sideman, can be involved in ... a violation of any state or federal law by public

officials ...." (A17).

The District Judge was more to the point:

> "If, arguendo, the Village officials then do something unlawful, ... we see no basis for a claim against the citizens who demanded legal action" (A35).

Of course, the District Judge qualified his point by the clause "who demanded legal action," which will be shown below to be an assumption contrary to the rule prevailing on a motion for summary judgment and unwarranted by the allegations of appellants, which must be taken to be true on this motion. The fact remains that the District Judge did not conclude that the allegations of appellants were insufficient to establish a violation of law by the defendant public officials.

Nor did Sideman or the District Judge suggest that the defendant residents did not participate to a substantial extent in the activities leading up to the proceedings taken against appellants by the defendant public officials and, in the case of Sideman, in the proceedings themselves. Thus, Sideman's counsel effectively assumed that his client exerted "pressure" on the defendant public officials, arguing that --

> " ... any resident has a right, and even a constitutional right to 'exert pressure' on any public official provided, of course, that such pressure is not exerted in any illegal manner" (A17).

Note, again, the use, this time by Sideman's counsel, of the qualifying clause containing the legally unsound and factually unwarranted assumption that his client did not act in an illegal manner.

Here, too, the District Judge was more blunt:

> " ... we assume, that Mrs. Sideman, together with her conspirators, persuaded the defendant Village officials to invoke the cabaret ordinance against plaintiffs, and likewise the unnecessary noise ordinance" (A34).

In addition to the foregoing, it is undisputed that Sideman actively participated in each and every one of the proceedings brought under the "unnecessary noise" ordinance by making the initial informal complaint upon which the Village police issued the summons (A24-A25, A43-A44).

The only element, therefore, that would appear to be lacking thus far in making Sideman and the other defendant residents responsible for the violation of law that Sideman and

the District Judge assumed to have been committed by the defendant public officials in this case is the knowledge that when they "persuaded" the defendant officials to invoke the ordinances in question, and when Sideman assisted in the proceedings under the "unnecessary noise" ordinance, they and she were participating in proceedings that were in violation of the law.

It has repeatedly been held that private citizens, as well as public officials, may be chargeable under 42 U.S.C. § 1983, if the private citizens are wilful -- i.e., knowledgeable -- participants in joint activity with public officials who are in violation of the statute.

Adickes v. Kress & Co., 398 U.S. 144 (1970); Baldwin v. Morgan, 251 F.2d 780, 788-789 (5th Cir. 1958); Hoffman v. Holden, 268 F.2d 280, 298 (9th Cir. 1959); Valle v. Stengel, 176 F.2d 697, 702 (3d Cir. 1949); Luker v. Nelson, 341 F. Supp. 111, 121 (N.D. Ill., E.D. 1972).

In the Valle case, police authorities in New Jersey forcibly removed black citizens from a privately owned amusement park. In refusing to dismiss the case against the defendants who owned and managed the amusement park, the court

held that --

> "Since the complaint alleges in effect that he [the police chief] aided and abetted the corporate defendant and the managing defendants, his actions may be attributed to them and treated as their own" (176 F. 2d 697, 702).

In the present case, it may well be said the defendant public officials effectively removed appellants' discotheque from the area in which Sideman and the other defendant residents resided, and thereby aided and abetted the residents, so that the actions of the officials should be attributed to the residents, provided only that knowledge of the illegal nature of the actions of the officials may be said to have been known to the residents.

At the present stage of this case, however, it is not the knowledge of Sideman and the other defendant residents that appellants must prove but only the existence of a triable issue concerning that knowledge. Little more than one month ago, this Court reversed a summary judgment against the plaintiff in an action brought under 42 U.S.C. § 1983, with the following comment:

> "The responsibility of the district judge on a motion for summary judgment is merely to determine whether there are issues to be tried, rather than to try the issues himself via affi-

davits" (Jaroslawicz v. Seedman, N.Y.L.J. 1/12/75, [2d Cir., December 19, 1975; not yet officially reported]).

As the Court indicated in the citations following the foregoing passage, its decision followed hard upon the heels of Heyman v. Commerce & Industry Insurance Co., No. 75-7230 (2d Cir., October 24, 1975, also not yet officially reported), in which the Chief Judge emphasized that --

> " ... when the [district] court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought."

In the instant case, it is respectfully submitted that the District Judge did not seek to determine whether there was an issue of fact; rather, he tried that issue, on affidavits, and in doing so he resolved major ambiguities and drew major inferences against appellant.

As indicated above, the key assumption made by the court below was that Sideman and the other defendant residents "demanded legal action" (A35; emphasis supplied). This assumption is repeated in several ways in the opinion below --

> "Mrs. Sideman and her neighbors, Doe, Roe

> Hoe enjoy First Amendment rights. They are entitled to speak, and even to speak, and even to speak sharply, to their elected representatives concerning those goals [the 'blessings of quiet seclusion']. When they assemble at public hearings and request the local officials to "do something" about the discotheque, it will be presumed that they intend something lawful to be done" (A34; emphasis supplied).

Although only one of them has been emphasized by appellant, there are several assumptions in the foregoing passage, all adverse to appellants, all contrary to the allegations in the complaint and appellants' affidavits. First of all, the District Judge assumed that Sideman and the other defendant residents did no more than present a grievance to the defendant public officials as opposed to dictating the resolution of the grievance to the officials. Secondly, the District Judge assumed that Sideman and the other defendant residents did no more than to speak "sharply," as opposed to speaking of or suggesting illegal activity. Thirdly, the District Judge assumed that Sideman and the other defendant residents assembled only at "public meetings," spoke only publicly, and must be judged only by what they said publicly (although that is damning enough as will be demonstrated below), instead of also meeting privately and even secretly. Lastly, of course, the District Court flatly assumed that Sideman

and the other defendant residents requested the defendant officials to take only legal action and intended that the officials would take only such action, instead of the illegal action the officials actually took.

Every one of the foregoing assumptions begs the issue presented by the Sideman motion for summary judgment and by this appeal, and is contrary to the allegations of the complaint and the more detailed statements in appellants' affidavits.

The complaint makes no distinction between the defendant residents and the defendant public officials, any more than it does between the defendant Mayor and the defendant Village Attorney or the defendant Police Chief. It treats them all as equals who sat down together and figured out what could and should be done with appellants, which, it is reasonable to infer, is precisely what happens when the most influential residents* of a village wish their public officials to take action. Thus, paragraph 12 of the complaint alleges that --

*An indication of the Sidemans' affluence, which, realistically, may be taken as a measure of their influence, is the fact brought out by Mr. Sideman at one of the public meetings on the "parking problem" that they own four cars.

" ... defendants, individually and in conspiracy with each other, have taken action to close down plaintiffs' discotheque and otherwise to deprive plaintiffs of rights, privileges and immunities secured to them by the Constitution and the laws of the United States, ..." (A5).

Paragraph 18 of the same pleading alleges that --

" ... defendants, acting through the Police Department of the Village, caused the individual plaintiff to be charged with the first of numerous violations or alleged violations of two ordinances of the Village, ..." (A7).

Paragraph 36 of the same document alleges more pointedly --

"In the respects set forth, defendants and each of them acted wilfully and maliciously, with the intent of closing down plaintiffs' discotheque permanently and otherwise discriminating against plaintiffs and depriving them of the equal protection of the laws and equal privileges and immunities thereunder, and with the knowledge that plaintiffs would thereby suffer irreparable damage" (A12; emphasis supplied).

Before leaving the complaint, a word should be said in response to the argument made in the initial affidavit of Sideman's attorney that "[t]he only place where the defendant, Edith Sideman's name is mentioned in the complaint is in paragraph '5' wherein it is alleged: 'defendant Edith Sideman was and now is a resident of the Village'" (A17). This argument overlooks

the fact that Sideman, as one of the defendants, is referred to in the complaint each time the word "defendants" is used therein, and that one defendant's name need not be repeated every time that all defendants are alleged to have participated in the same act jointly.

In appellants' affidavits, however, Sideman's part in the joint activity is spelled out in some detail. Specifically, it is shown that she participated in raising the bogus "parking problem" (A40); tried to obtain a parking ban that would discriminate against appellants' patrons (A40); succeeded in persuading the Village police to apply such a ban on her street (A40); maliciously interfered in appellants' contractual arrangements with the landlord of the A & P supermarket (A21), and lastly, but most importantly, played a key role in the application of the unconstitutionally vague "unnecessary noise" ordinance, which was invoked against appellants whenever Sideman decided that it should be invoked (A24-A25, A43-A44).

Moreover, the detailed newspaper reports in the final affidavit submitted by appellants to the court below more than suggest that it was Sideman and the other defendant residents

who prodded the defendant public officials into taking illegal action against the latters' better judgment. It was Sideman and the other defendant residents who suggested the obviously illegal parking bans, and the defendant public officials who resisted those suggestions (A39-A40), and who pointed out that appellants were not violating any laws by operating a discotheque in the area in which their discotheque was located (A42).

There are thus strong indications that Sideman and the other defendant residents were as responsible as, if not more responsible than, the defendant public officials for the illegal actions taken against appellants. There is no need, however, for that fact to be proved at this time. There is need only that an issue concerning that fact be shown to exist.

Before concluding, it bears repeating that not a single one of the allegations in appellants' papers alleging that Sideman acted as a full, equal and knowledgeable participant in the violation of law the District Judge assumed to have been committed in this case has been denied by Sideman. They were not even denied by her counsel in the affidavits he submitted on her behalf (A16-A18, A49-A50). This particular defect in the

papers of the party moving for summary judgment was the ultimate reason stated by this Court in Jaroslawicz, supra, for reversing the judgment in that case.

> "Indeed the affidavits offered in support of [the defendant's] motion failed to demonstrate the absence of a factual dispute regarding [defendant's] 'reasonable belief' .... [Defendant was not competent to testify ... , and no affidavits were offered by [other witnesses] who were present."

This statement from the opinion in Jaroslawicz could be applied verbatim to the present case, with the substitution of "knowledge" for "reasonable belief" and "failed" for "was not competent."

Conclusion

THE JUDGMENT APPEALED FROM

SHOULD BE REVERSED.

Respectfully submitted,

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs-Appellants

Of counsel:
STANLEY GELLER

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HOWARD HARROW, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5 UNIVERSITY PL, NEW YORK, N.Y.

That on the 30th day of JANUARY, 1976, deponent personally served the within BRIEF OF PLAINTIFFS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ZIMMER, FISHBACH + HERTAN
ATTORNEYS FOR DEFENDANT-APPELLEE
EDITH SIDEMAN
919 THIRD AVE
NEW YORK, N.Y.

Howard Harrow

Sworn to before me this
30th day of January, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977